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IN THE

Supreme Court of the United States

October Term, A. D. 1931

No. 79

CHICAGO & EASTERN ILLINOIS R. R. CO.,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS and JOE THOMAS,

Respondents.

Brief and Argument for Petitioner.

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Of Counsel.

(35,881)

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INDEX.

Subject Index.

	PAGE
Jurisdiction	1-3
Argument	9
Statement of the case	4
Specification of errors relied upon	6
Ultimate question	6

Summary of Points Presented:

I. An employee of a railroad company engaged in caring for or operating a coal chute and motor connected therewith which are regularly and constantly used for the purpose of coaling engines used indiscriminately in interstate and intrastate commerce, as was respondent in the case at bar, is engaged in work in interstate commerce 7

II. Where the work at which a railroad employee is engaged at the time of his injuries is work in interstate commerce, the employee is not entitled to compensation under the State's Workmen's Compensation Act, but his remedy, if any, is under the Federal Employers' Liability Act 7

Table of Cases and Statutes Cited.

Cases Cited.

American Railway Express Co. v. Levee, 263 U. S. 19.. 3

Erie R. R. Co. v. Collins, 253 U. S. 77 .....2, 7, 9

Erie R. R. Co. v. Collins, 259 Fed. 172 .....7, 10

Erie R. R. Co. v. Szary, 253 U. S. 86 .....7, 14

Erie R. R. Co. v. Winfield, 244 U. S. 170 .....2, 6, 7, 14

Horton v. Oregon W. R. & N. Co., 130 Pac. 897, 901.....7, 12

Kelly v. Erie R. R. Co., 188 App. Div. 83, 177 N. Y. Supp. 278, 279 13

Minneapolis, etc. R. Co. v. Rock, 279 U. S. 410-12 3

New York Central v. Winfield, 244 U. S. 147.....7, 14

Rousch v. B. & O. R. R. Co., 243 Fed. 712 .....7, 11

PAGE

Sells v. Grand Trunk Ry. Co., 206 Ill. App. 45, 51 13

So. Pac. Co. v. Industrial Accident Commission, 251 U. S. 259 ..... 7, 8, 14

Toledo, etc. & Western R. R. Co. v. Slavin, 236 U. S. 454 ..... 8, 14

Western Union Telegraph Co. v. Crovo, 220 U. S. 364 3

STATUTES CITED.

Federal Employers' Liability Act (Mason's United States Code, 1926, Vol. 3, p. 3064), 35 Stat. 65, Chap. 149 8

Workmen's Compensation Act of the State of Illinois (Smith-Hurd Illinois Revised Statutes, 1929, Chap. 48, pp. 1423, 1425, 1427, 1430) 8

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BRIEF AND ARGUMENT FOR PETITIONER.

This case is here pursuant to writ of certiorari to the Circuit Court of Cook County, Illinois, granted on application of the Chicago & Eastern Illinois R. R. Co., (hereinafter referred to as petitioner).

There are no reported opinions or decisions of the lower courts in the case.

This action was commenced by the respondent, Joe Thomas, by the filing of an application for adjustment of claim with the Industrial Commission of Illinois, January 18, 1930 (R. 7), under which he sought to recover compensation in accordance with the provisions of the Workmen's Compensation Act of Illinois on account of personal

injuries sustained by him while in the employ of petitioner at Chicago Heights, Illinois.

The defense of petitioner to said action depends and is based upon the Federal Employers' Liability Act (Mason's U. S. Code, 1926, Vol. 3, Page 3064) 36 Stat. 65, Chap. 149. It is petitioner's contention that at the time of the happening of the injuries in question, respondent was engaged in work in interstate commerce, and that, therefore, the Industrial Commission of Illinois was without jurisdiction of the case as the rights of the parties were governed by the Federal Employers' Liability Act and not the Workmen's Compensation Act of Illinois.

Erie R. R. Co. v. *Winfield,* 244 U. S. 170.

Hearing was had before an Arbitrator appointed by said Industrial Commission (Smith-Hurd Ill. Rev. Stat. 1929, Chap. 48, p. 1423 (*a*)), and upon said hearing it was stipulated that one of the questions in dispute was the question as to whether at the time of the injuries to respondent, the parties were operating under the provisions of the Workmen's Compensation Act of Illinois or the Federal Employers' Liability Act (R., 12-13).

The Arbitrator rendered decision March 6, 1930 (R. 62-63) in which the Arbitrator held that the parties were not at the time of the happening of the injuries operating under the Workmen's Compensation Act of Illinois and dismissed the petition for want of jurisdiction, said decision being based upon the theory that at the time of the happening of the accident respondent was engaged in work in interstate commerce and that, therefore, the Industrial Commission was without jurisdiction.

In rendering said decision, the Arbitrator cited and followed the decision of this Court in *Erie R. R. Co.* v. *Collins,* 253 U. S. 77 (R. 63).

March 18, 1930 (R. 65) respondent filed petition for a review of the award of the Arbitrator with said Industrial Commission (Smith-Hurd Ill. Rev. Stat. 1929, Chap. 48, page 1425 (*e*)), and on July 8, 1930, said Commission reversed the decision of the Arbitrator and awarded compensation to the respondent in an amount aggregating $2184.64 (R. 69).

Petitioner sued a writ of error out of the Circuit Court of Cook County, Illinois on July 28, 1930 (R. 1) to review said decision of the Industrial Commission (Smith-Hurd Ill. Rev. Statute 1929, Chap. 48, p. 1427 (1)), and said Circuit Court confirmed said award December 31, 1930 (R. 73).

Under the Illinois statutes, the only method by which judgments or orders of the Circuit Court in such cases can be reviewed is upon writ of error to the Supreme Court (Smith-Hurd Illinois Revised Statutes, 1929, Chap. 48, p. 1430 (2)). Said statute is in part as follows:

> "Judgments or orders of the Circuit Court under this Act (Compensation Act) shall be reviewed only by the Supreme Court upon a writ of error which the Supreme Court in its discretion may order to issue."

Petitioner filed petition for writ of error in the Supreme Court of Illinois to review the judgment and order of the Circuit Court in said case, which petition was denied by the Supreme Court February 8, 1931 (R. 74), thus making the order and judgment of the Circuit Court of Cook County, Illinois final, and making said Court the highest Court in the State of Illinois in which a decision could be had.

Western Union Telegraph Co. v. *Crovo,* 220 U. S. 364;

American Railway Express Co. v. *Levee,* 263 U. S. 19;

Minneapolis, etc. R. Co. v. *Rock,* 279 U. S. 410-12.

STATEMENT OF THE CASE.

As to the material facts there is no dispute.

Petitioner is an interstate railroad, with its lines extending into the States of Indiana, Illinois and Missouri (R. 44). On July 15, 1929, the date of the happening of the injuries in question to respondent, he was in the employ of petitioner in the terminal switchyard at Chicago Heights, Illinois (R. 13, 38, 56), his duties consisted of caring for and operating a coal chute and electric motor used in connection therewith, and taking care of a roundhouse and cinder-pit in said yard (R. 20, 21, 38, 59). It was his regular daily duty to keep said coal-chute filled with coal (R. 21, 24), which he did by hoisting same from the ground into the chute by means of an electric motor connected therewith (R. 22-23, 57), and he also frequently coaled and watered the engines hereinafter referred to (R. 19, 24). Said coal chute and motor had been in operation at the same place for many years (R. 27) and were entirely separate from the roundhouse and located about three hundred feet distant therefrom (R. 54). On the day in question respondent, in the course of his regular duties (R. 15, 24), went to the coal chute for the purpose of filling it with coal, and started the engine running for the purpose of hoisting coal into the chute, and while it was running attempted to grease it from underneath and got his hand caught in the gears, causing the injuries in question (R. 15, 22). All of the coal which respondent hoisted into said chute was used for coaling the switch-engines which operated in and around said terminal yard (R. 23, 59). There were five engines which regularly operated in said yard and coaled at this particular chute (R. 27, 56). Four were regular switch-engines, referred to as Chicago Heights Terminal engines (R. 56; 38, 39), and one larger engine, referred to as the C. & E. I. engine (R. 56). These engines were regularly used in moving freight which was brought into and shipped out of the industries

at Chicago Heights (R. 23), which surrounded said terminal yard; and the undisputed evidence shows that seventy-five per cent of said freight was interstate freight (R. 43), and all of the freight which passed through said yard was handled by said engines, which worked every day (R. 27).

There were sixty-five industries which were served by said engines and from said terminal yard (R. 40), which said yard connected with a number of railroads, viz., Chicago, Milwaukee & St. Paul, Michigan Central, B. & O. C. T., and C. & E. I. (R. 39), and the switch-engines above referred to would regularly take the freight which was brought into Chicago Heights by said railroads and deliver same to the various industries, and in turn switch manufactured goods from said industries back to said connecting lines (R. 38, 39, 23). As above stated, it is undisputed that approximately seventy-five per cent of the freight handled from day to day in said terminal yard and by said engines was interstate freight (R. 43). In short, the evidence shows that the coal chute and motor in question which respondent was operating at the time he was injured was regularly used for the purpose of fueling said engines, which were constantly and regularly engaged indiscriminately in both intra- and interstate commerce; and the coal which was hoisted by respondent into said coal chute was all used in said engines.

The proceedings had before the Industrial Commission and in the state courts are set forth in detail on pages 1, 2 and 3, *supra,* and we will not repeat them.

It is the contention of petitioner that under the facts in this case, concerning which there can be no material dispute, respondent was at the time of the happening of the injuries in question, engaged in work in interstate commerce and that therefore the Industrial Commission of Illinois was without jurisdiction of the case and the Circuit Court of Cook County, Illinois, erred in not so holding because respondent's right of action, if any, is governed by

the Federal Employers' Liability Act and not by the Workmen's Compensation Act of Illinois (See *Erie R. R. Co.* v. *Winfield*, 244 U. S. 170).

Specification of errors relied upon.

The Industrial Commission of the State of Illinois was without jurisdiction of the case.

The Circuit Court of Cook County, Illinois, erred in not holding that the Industrial Commission of Illinois was without jurisdiction of the case because the undisputed evidence shows that the claimant Joe Thomas (respondent herein) was at the time he sustained the injuries in question, engaged in work in interstate commerce.

The finding and order of the Circuit Court of Cook County, Illinois, affirming the decision of the Industrial Commission of Illinois are contrary to the evidence in the case.

The finding and order of the Circuit Court of Cook County, Illinois, affirming the decision of the Industrial Commission of Illinois are contrary to the law.

The Circuit Court of Cook County, Illinois, erred in not reversing the decision of the Industrial Commission of Illinois.

The Circuit Court of Cook County, Illinois, erred in not quashing the proceedings, record and award of the Industrial Commission of Illinois.

Ultimate question.

The ultimate question, is whether the right of action, if any, of a railroad employee who was injured while operating or caring for a coal chute and motor connected therewith, which was regularly and constantly used in coaling engines used indiscriminately in interstate and intrastate commerce, is governed by the Federal Employers' Liability Act or by the Workmen's Compensation Act of the state wherein the injury occurred.

SUMMARY OF POINTS PRESENTED AND AUTHORITIES.

I.

An employee of a railroad company engaged in caring for or operating a coal chute and motor connected therewith which are regularly and constantly used for the purpose of coaling engines used indiscriminately in interstate and intrastate commerce, as was respondent in the case at bar, is engaged in work in interstate commerce.

Erie R. Co. v. *Collins*, 253 U. S. 77.

Erie R. R. Co. v. *Collins*, 259 Fed. 172.

Erie R. Co. v. *Szary*, 253 U. S. 86.

So. Pac. Co. v. *Industrial Accident Commission*, 251 U. S. 259.

Rousch v. *B. & O. R. R. Co.*, 243 Fed. 712.

Horton v. *Oregon W. R. & N. Co.*, 130 Pac. 897-901.

Sells v. *Grand Trunk Ry. Co.*, 206 Ill. App. 45, 51.

II.

Where the work at which a railroad employee is engaged at the time of his injuries is work in interstate commerce, the employee is not entitled to compensation under the State's Workmen's Compensation Act, but his remedy, if any, is under the Federal Employers' Liability Act.

Erie R. R. Co. v. *Winfield*, 244 U. S. 170.

New York Central v. *Winfield*, 244 U. S. 147.

Toledo, etc. & Western R. R. Co. v. *Slavin*, 236 U. S. 454.

So. Pac. Co. v. *Industrial Accident Commission*, 251 U. S. 259.

Statutes involved.

Federal Employers' Liability Act, (Mason's U. S. Code, Vol. 3, page 3064), 35 Stat. 65, Chap. 149;

Workmen's Compensation Act of Illinois (Smith-Hurd Ill. Rev. Stat. 1929, Chap. 48, pages 1423, 1425, 1427, 1430).

ARGUMENT.

As the record shows, respondent at the time he sustained the injuries complained of, was engaged in operating an electric motor for the purpose of hoisting coal into a coal chute, all of which coal was to be used in fueling switch engines which were regularly used indiscriminately in interstate and intrastate commerce. Such being the case, respondent was, we submit, at said time engaged in work in interstate commerce and his rights, if any, are controlled by the Federal Employers' Liability Act, and not the Workmen's Compensation Act of the State of Illinois.

As to this, the case of *Erie R. Co.* v. *Collins,* 253 U. S. 77, is directly in point. In that case the plaintiff, Collins, was hurt while starting a gasoline engine which pumped water into a tank which supplied water to both interstate and intrastate trains. It appeared that the plaintiff was not familiar with starting the engine and it exploded by reason of the fumes of the gasoline being ignited by a lantern or fire. In that case this Court held that the plaintiff, at the time of the happening of the injury, was engaged in interstate commerce.

There is no material difference between the facts in the *Collins case* and those in the case at bar. In the *Collins case* the injured man was starting the engine for the purpose of pumping water into a tank, which water was later to be used in watering engines used both in interstate and intrastate commerce, while in the case at bar, respondent was greasing the motor which he had started running for the purpose of hoisting coal into the chute, all of which coal was to be used in coaling engines engaged in both interstate and intrastate commerce.

In the course of its opinion, this Court stated, p. 85:

> "In the *Pedersen case* it was said that the questions which naturally arise: 'Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?' Or, as said in *Shanks* v. *Delaware, L. & W. R. Co., supra,* 'was the work so closely related to it (interstate commerce) as to be practically a part of it?' The answer must be in the affirmative. Plaintiff was assigned to duty in the signal tower and in the pump house, and it was discharged in both on interstate commerce as well as on intrastate commerce, and there was no interval between the commerces that separated the duty, and it comes, therefore, within the indicated test. It may be said, however, that this case is concerned exclusively with what was to be done, and was done, at the pump house. This may be true, but his duty there was performed and the instruments and facilities of it were kept in readiness for use and were used on both commerces as was demanded, and the test of the cases satisfied."

Particularly applicable to the facts in the case at bar, is the language and reasoning of the United State Circuit Court of Appeals in its opinion in the *Collins case, supra,* when that case was before it, 259 Fed., 172. In the course of its opinion, that court, after distinguishing the *Harrington case,* 241 U. S. 177, which was cited by the plaintiff, pointed out that the putting of coal in chutes from which it was to be taken by locomotives engaged in interstate and intrastate commerce, was work in interstate commerce, and stated as follows on page 175:

> "In unloading the coal into the chute, from which it was to be taken by the locomotives in interstate and intrastate commerce, it became converted into an instrumentality of interstate commerce. The act of putting the coal into the chutes from which the engines can take it is an act performed in interstate commerce, as much so as is the act of putting water into the trough by the side of the tracks to be scooped by passing engines; and we cannot distinguish the act of

> putting the coal into the coal chutes for the supply of the engines from the act of putting rails alongside of a track into which they are to be fitted or the bolts by the side of the bridge, as in the *Pedersen case.*"

The Court also stated as follows at the top of said page:

> "The water tank, the pump house, the pump, and the gasoline engine, used for the purpose of keeping the water tank supplied with water, were, under the circumstances, just as essential to the practical operation of the defendant's interstate commerce business as the tracks over which its trains were propelled."

The foregoing case is, it seems to us, directly in point and conclusive as to the case at bar. There are, however, a number of other cases in point to which we beg to call the Court's attention.

In *Rousch* v. *B. & O. R. R. Co.*, 243 Fed. 712, plaintiff, an employee of the defendant railroad company, while attempting to determine the depth of water in a cistern was injured by an explosion of gases which had accumulated therein. Said cistern was a part of a pumping station, which plaintiff operated, which supplied water indiscriminately to the locomotive engines of the defendant. The Court held that the plaintiff was engaged in interstate commerce at the time of his injury and said, pages 713, 715:

> "The solution of this inquiry depends on whether or not an employee engaged in operating a pumping station, which furnishes water to be used indiscriminately and contemporaneously for interstate and intrastate business, is within the Federal Employers' Liability Act. The test is whether the plaintiff, at the time of the accident, was engaged in interstate transportation, or in work so closely related thereto as to be practically a part thereof. * * * (p. 713.)
>
> I am of opinion that the present case is within the rule of the *Pedersen case.* The pumping station was an instrumentality being used indiscriminately for interstate and intrastate commerce. The work being

performed by the plaintiff was so closely related to interstate transportation as to be practically a part of it. He was not engaged in original or independent work too remotely connected with interstate transportation to be said not to be practically a part thereof. It is true, his work also was necessary in carrying on intrastate transportation; but when the efforts of the employee at the time he was injured may relate to either class of transportation, then he is within the Act, and his right of action is controlled by it." (p. 715.)

In *Horton* v. *Oregon W. R. & N. Co.*, 130 Pac. (Wash.) 897, plaintiff's intestate was employed by the defendant railroad company as a pumper and he operated a plant for the purpose of supplying water to the company's locomotives. He lived some distance from the plant and the company furnished him with a handcar to go to and from his home, and while coming to work he was struck and killed by a train. The Court held that he was at the time engaged in the work of interstate commerce, and in the course of its opinion, said page 901:

"Was the relation of his employment to interstate commerce such that an injury to him tended to delay or hinder the movement of trains engaged in such commerce? There is but one answer to the question. Water to supply the engines pulling such trains had to be pumped as a necessary incident to the movement of trains. If, when he was killed, his place had not been supplied by another, the movement of trains engaged in interstate commerce conducted by the master, as well as the local trains, must have ceased altogether. * * * There can be no possible distinction in the relation to interstate commerce between the employment of the fireman who stokes the engine hauling the train so engaged and that of the man who pumps the water for the same engine. The engine would not run without the service of either. If there is a distinction, it is too fine-spun and diaphanous for ordinary perception. To hold that there is any material distinction would be as unjust as artificial. * * *"

In *Sells* v. *Grand Trunk Ry. Co.*, 206 Ill. App. 45, 51, plaintiff was in the employ of the defendant railroad company as a stationary engineer and was injured while repairing the hoisting device of a coal chute which was used for supplying defendant's engines with coal. The Court held that at the time of the happening of the injury plaintiff was engaged in work in interstate commerce, and in the course of its opinion said, page 51:

> "We think counsel for appellee were clearly correct in contending that switch engines engaged in breaking up trains conveying interstate commerce must be considered as also engaged therein. The business of plaintiff, therefore, was the operation of the instrumentality which actually loaded defendant's interstate commerce engines with fuel, and the evidence discloses that he was injured while repairing that instrumentality. In these circumstances it seems clear that the parties were engaged in interstate commerce within the rule laid down by the United States Supreme Court in *Shanks* v. *Delaware, L. & W. R. Co.*, 239 U. S. 556, that: 'The true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?' In view of the facts in this case, the continued operation of the coal chute was necessary to the continuance of defendant's interstate traffic; the repair of the instrumentality was as much a part of interstate commerce as the repair of a bridge regularly used in interstate transportation. * * *"

The case of *Kelly* v. *Erie R. R. Co.*, 188 App. Div. 83, 177 N. Y. Supp. 278, 279, is also in point. In that case the pumping station was operated by a gasoline engine. The crankshaft of the engine being connected with the pumping machinery by a clutch. The clutch slipped and in attempting to repair it the plaintiff was injured. It pumped water into an elevated tank, from which all engines were indiscriminately supplied and water was also used for general purposes in connection with the railroad

station. On the authority of the *Collins case, supra,* it was held that the plaintiff was engaged in interstate commerce at the time of his injury.

Each one of the above cases is in point. In each one, the injured employee was engaged in operating or repairing appliances used either in pumping water into tanks or hoisting coal into chutes to be used indiscriminately in operating interstate and intrastate engines and in each of said cases, it was held that he was at the time engaged in work in interstate commerce.

Another case in point in principle is *Erie R. R. Co.* v. *Szary,* 253 U. S. 86. In that case an employee of a railroad engaged in both inter- and intrastate commerce whose duty it was to dry sand in stoves in a small structure near the tracks and supply it to the locomotives, whether operating in the one kind of commerce or the other, was injured while returning from an ash-pit whither he had gone to dump ashes taken by him from one of the stoves after sanding several locomotives. It was held that he was engaged in interstate commerce.

Under the rule laid down in the foregoing cases, there can, we submit, be no question but that respondent was at the time of his injury engaged in work in interstate commerce. Such being the case, he is not entitled to maintain this action, for his rights, if any, are controlled exclusively by the Federal Employers' Liability Act.

As to this, see *Erie R. R. Co.* v. *Winfield,* 244 U. S. 170; *N. Y. Central R. R. Co.* v. *Winfield,* 244 U. S. 147; *Toledo, etc., & Western R. R. Co.* v. *Slavin,* 236 U. S. 454, and *So. Pac. Co.* v. *Industrial Accident Commission,* 251 U. S. 259.

The rule applicable is stated in the syllabus of *New York Central* v. *Winfield,* 244 U. S. 147, as follows:

> "The liabilities and obligations of interstate railroad carriers to make compensation for personal injuries suffered by their employees while engaged in

interstate commerce are regulated both inclusively and exclusively by the Federal Employers' Liability Act; and, Congress having thus fully covered the subject, no room exists for state regulation, even in respect of injuries occurring without fault, as to which the federal act provides no remedy."

Under the rule laid down in the foregoing cases, the Industrial Commission of Illinois was clearly without jurisdiction of the case, and had no power or authority to make an award of compensation against petitioner, and the Circuit Court of Cook County, Illinois, erred in not reversing and setting aside the decision and award of said Commission.

We, therefore, respectfully submit that the order and judgment of the Circuit Court of Cook County, Illinois, in this case confirming the decision of the Industrial Commission of Illinois should be reversed and that the proceedings and award of said Industrial Commission in said case should be quashed.

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Of Counsel.